National Association of Public Pension Attorneys
Winter Legal Education Conference
February 17 – 19, 2016
Washington DC

NAPPA's Winter Conference is generally divided into four sections – Investments, Fund Governance, Tax, and Benefits. This summary provides highlights from presentations in each of the four areas.

Investments

The most relevant presentation discussed the growing use of Environmental, Social and Governance (ESG) investments (socially responsible funds) and the latest guidance from the Department of Labor with respect to those investments. Per that guidance, in order to comply with a fiduciary's standard of care and duty of loyalty to their members, the Board must weigh ESG investments against non-ESG investments of the same type. "Other factors being the same" the Board can elect the ESG investment over a similar investment.

The Sustainability Accounting Standards Bureau is establishing "market standards" to use when determining whether "other factors are the same" and to also provide an accurate benchmark against which the ESG investment should be measured.

Fund Governance

The National Conference on Public Employee Retirement Systems (NCPERS) has developed a Code of Conduct for Public Service Pension Providers that identifies ten principles that service providers should observe. The top two areas of focus are exactly the same areas we have the most difficulty negotiating with our providers – indemnification and limited liability. The biggest take away from the presentation was the Board's fiduciary duty to audit the providers' performance in order to ensure compliance with the contract and law.

Benefits

The first section was titled "Responding to the Media: Interest Group Attacks, Misinformation and FOIA requests." The discussion centered not on what information can be provided but on the fiduciary implications of using trust fund assets to respond to these requests. The presenters questioned whether using trust fund dollars to respond to media requests and public relations efforts meets the "exclusive benefit rule". The plans that see no violation believe that the expenses would not exist "but for" the administration of the plan and that therefore the expenses are "reasonable and necessary". Plans who oppose the use of trust funds for these purposes believe that trust fund assets can't be used for "settlor" functions. That take away from the presentation is that it's the Board's fiduciary duty to decide whether to spend assets in this manner and if so, to establish guidelines for those expenses.

Tax

The Tax section provided a laundry list of tax issues being addressed by the IRS and public pension plans, and addressed the end of the Determination Letter (Cycle C/E) process. The tax issues were remarkably similar to those we have faced: tax exempt status of line of duty benefits to members and survivors; normal retirement age; the impact of elections on the "pick-up" status of contributions; the effect of the *Windsor* and *Obergefell* same-sex marriage decisions.

Senior Counsel Seminar

This seminar was conducted Friday morning and was somewhat less valuable than in past years. The best discussions centered on how to respond to IRS audits, collecting overpayments from bankrupt plan members, and responding to federal criminal court restitution orders.